IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. RICARDO GUILLERMO SNYDER, Appellant.	)	2 CA-CR 2006-0047 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20044500

Honorable Hector E. Campoy, Judge

AFFIRMED

Nathan D. Leonardo — Tucson
Attorney for Appellant

B R A M M E R, Judge.

¶1 After a jury trial, appellant Ricardo Guillermo Snyder was convicted of attempted first-degree murder, aggravated assault with a deadly weapon or dangerous instrument, kidnapping, possession of a narcotic drug for sale, and possession of drug paraphernalia. The jury found the first three offenses were of a dangerous nature, having involved the use, discharge, or threatening exhibition of a firearm, and that the serious physical injury suffered by the victim was an aggravating circumstance that existed as to

those offenses. The court imposed concurrent, aggravated terms of imprisonment on those three counts, the longest of which was fifteen years. On the narcotic drug possession conviction, the court imposed a presumptive prison term of five years, consecutive to the sentences imposed on the first three offenses, but concurrent with the presumptive, one-year term it imposed for the possession of drug paraphernalia conviction.

¶2 Counsel has filed a brief in compliance with *Anders v. California*, 386 U.S. 738, 87 S. Ct. 1396 (1967), and *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969), stating that he has thoroughly reviewed the record on appeal and has found no meritorious issues to raise. He asks this court to search the entire record for error and directs our attention to six arguable issues. Snyder has not filed a supplemental brief. Finding no error, we affirm.

¶3 Citing *State v. Donald*, 198 Ariz. 406, 10 P.3d 1193 (App. 2000), counsel first suggests Snyder might have been denied effective assistance of counsel if a plea offer had been made and counsel had failed to competently explain its risks and benefits. As counsel acknowledges, not only does the record lack an affirmative showing that any plea was ever offered, but more importantly, claims of ineffective assistance may not be raised on direct appeal. *State v. Spreitz*, 202 Ariz. 1, ¶ 9, 39 P.3d 525, 527 (2002). Accordingly, we do not address this issue.

¶4 The second arguable issue identified by counsel concerns the trial court's denial of Snyder's request for lesser-included offense instructions for attempted second-degree murder and attempted manslaughter. We agree with counsel's assessment that this claim lacks merit. The evidence showed that before shooting the victim, Snyder had told the

victim he had a "surprise" for him. The victim had asked Snyder "to pardon [him], because [his] mother had died that day." Snyder responded that the victim "would be going to accompany her" and shot the victim once. Snyder then told the victim he would transport him to a hospital or to a person who could help him, but instead drove him to a very lightly traveled, dark road alongside Davis-Monthan Air Force Base, where Snyder shot him twice more before leaving him alone, injured. Snyder did not defend these charges based on a lack of premeditation for the alleged acts; his sole defense was that he had been completely uninvolved in the shooting. Because no evidence justified giving the lesser-included offense instructions Snyder had requested, the trial court's denial of the request was not error. *See State v. Jackson*, 186 Ariz. 20, 27, 918 P.2d 1038, 1045 (1996).

¶5 Next, counsel suggests we should remand this case to determine whether Snyder received adequate notice of the state's intent to allege the victim's serious physical injury as an aggravating factor. Snyder never claimed below that whatever actual notice he received had been inadequate, nor does the record offer any indication that the allegation caught him by surprise. The absence of objection below waived all but prejudicial fundamental error. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005). Even assuming the state's notice was insufficient, we find no prejudice. Given Snyder's defense of misidentification, it is difficult to conceive how any amount of notice would have changed the outcome. Snyder never disputed that the victim had been shot three times.

¶6 In the fourth arguable issue identified, counsel points out that the state's amended indictment lacks any statutory references to sentence enhancement provisions or any specific allegations that the first three offenses were alleged as dangerous nature offenses. We find no reversible error. The original indictment included a formal, separate allegation on counts two and three that the charged offenses were of a dangerous nature, and count one included a specific citation to A.R.S. § 13-604(I), a sentence-enhancement provision prescribing, *inter alia*, an increased penalty for a defendant's first conviction of a class two felony involving the discharge, use, or threatening exhibition of a deadly weapon or dangerous instrument where serious physical injury has occurred. The record contains no objection by Snyder to the inclusion of the dangerous nature allegations on the verdict forms for all three offenses, and there is no evidence he was surprised or prejudiced as a result of the manner in which the amended indictment was fashioned.

¶7 Snyder objected below to the trial court's instructing the jury on reasonable doubt in accordance with *State v. Portillo*, 182 Ariz. 592, 898 P.2d 970 (1995). Counsel's fifth issue contends the *Portillo* instruction's use of the phrase "firmly convinced" arguably reduced the state's burden of proof from beyond a reasonable doubt to clear and convincing evidence. Our supreme court has already rejected the potential argument identified by counsel, *see State v. Dann*, 205 Ariz. 557, ¶ 74, 74 P.3d 231, 249-50 (2003), and we are bound to follow our supreme court's decisions, *see State v. Sullivan*, 205 Ariz. 285, ¶ 15, 69 P.3d 1006, 1009 (App. 2003).

¶8 Finally, counsel states one "conceivably" could argue that jury instruction number eleven, which directed the jury to base its determination of guilt on the facts, rather than possible punishment, was an improper instruction in the wake of *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531 (2004). *Blakely*, counsel contends, "so inextricably links the jury to sentencing that it implicitly intends that juries consider possible punishment." We disagree. *Blakely* offers no suggestion that any fact-finder, be it a judge or a jury, should consider a defendant's possible punishment when determining the facts of a case. The trial court did not err in instructing the jury.

¶9 Pursuant to our obligation under *Anders*, we have reviewed the entire record. We are satisfied that reasonable evidence established all the elements of the offenses for which Snyder was convicted. Our review of the pretrial and sentencing proceedings, likewise, has shown the presence of no errors which can be characterized as fundamental and prejudicial.

¶10 Snyder's convictions and sentences are affirmed.

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J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

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PETER J. ECKERSTROM, Presiding Judge

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PHILIP G. ESPINOSA, Judge